Tentative Rulings for May 31, 2012
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

12CECG00388	***Mohamed Lameer, M.D. v. Mathew Abraham*** **is continued to June 14, 2012 at 3:30 p.m. in Dept. 502.**
09CECG01076	***Serrano v. Selma Auto Mall*** **is continued to June 7, 2012, at 3:30 p.m. in Dept. 503.**
10CECG04233	***Clark v. Sierra Pathology Laboratory, Inc. et al.*** **is continued to June 5, 2012 at 3:30 p.m. in Dept. 403.**
07CECG02392	***Macias v. TAG Automotive Group, Inc. et al.*** **is continued to June 6, 2012 at 3:30 p.m. in Dept. 503.**

(Tentative Rulings begin at the next page)

[10]

Tentative Ruling

Re: ***Dennis Napier v. Cindy Cohn, et al.***
Superior Court Case No. 11 CECG 03311

Hearing Date: Thurs., May 31, 2012 (**Dept. 503**)

Motion: Defendants' Motion to Quash
Service of Summons and Complaint

Brought by Defendants
1. Cindy Cohn
2. Tom O'Keefe
3. Charles Shivers
4. Glenn Major
5. Jim Voorhies
6. Ken Taniguchi

Tentative Ruling:

To GRANT. (CCP 418.10.)

Explanation:

Defendants move to quash service of the summons and complaint. They argue that they were not personally served with the summons and complaint. In support of their motion, they submit only the declaration of Marsha Koop, which is clearly insufficient to prove a lack of personal service. Koop is the Administrative Services Assistant at the Fresno County Public Defender's Office. But she cannot possibly have personal knowledge that all 6 defendants were not personally served. She can only testify as to whether they received substituted service at the Public Defender's Office where she works. At a minimum, counsel should have submitted the personal declarations of the 6 named Defendants.

However, in this case, the initial burden of producing evidence and the ultimate burden of proof lie with Plaintiff. "When a defendant challenges the court's personal jurisdiction on the ground of improper service of process the burden is on the plaintiff to prove . . . the facts requisite to an effective service." (**Summers v. McClanahan** (2006) 140 Cal.App.4th 403, 413.)

Normally, when the plaintiff files a valid proof of service, it creates a rebuttable presumption that service was proper. (**Dill v. Berquist Construction Co.** (1994) 24 Cal.App.4th 1426, 1441-1442.) But here, the plaintiff's proofs of service are defective on their face because they fail to show that plaintiff first made

reasonable attempts to effect personal service, before resorting to substituted service. (**CCP 415.20 (b)**; **Espindola v. Nunez** (1988) 199 Cal.App.3d 1389, 1392.)

Furthermore, at the time plaintiff attempted substituted service, defendants Shivers, Major, and O'Keefe were no longer employed as deputy public defenders by the County of Fresno. So that substituted service on them at the Fresno County Public Defender's Office was improper, as it was no longer their usual place of business. (Koop Decl. at ¶ 3.)

Plaintiff has filed no Opposition to this motion. Accordingly, Plaintiff has failed to present any evidence to show that proper personal service was attempted or completed.

Pursuant to CRC 3.1312(a) and CCP 1019.5 (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 5/29/12 .
(Judge's initials) (Date)

[25] **Tentative Ruling**

Re: ***In Re: Annikka Henry, a Minor***
Superior Court Case No. 12CECG00240

Hearing Date: Thursday, May 31, 2012 (Dept. 501)

Motion: Petition for Minor's Compromise

Tentative Ruling:

To deny without prejudice.

Explanation:

Petition is incomplete

Pages 6, 8, and 9 are missing from the Petition. The Court needs the entire, completed 10-page Petition (MC-350) before it can consider it.

No current medical report

A petition for a minor's compromise must contain a **full disclosure of all information that has any bearing upon the reasonableness of the compromise**, covenant, settlement, or disposition. *Cal. Rules of Court, rule 7.950 [emphasis added]*. Further, the petition must attach "an original or a photocopy of all doctors' reports containing a diagnosis of and prognosis for the injury, and a report of the claimant's present condition. A new report is not required as long as the previous report accurately describes the minor's current condition." *See Petition to Approve Compromise of Disputed Claim or Pending Action or Disposition of Proceeds of Judgment for Minor or Person With a Disability at* ¶9.

Here, no report of the minor's current condition is provided as required by Cal Rules of Court, rule 7.950 and ¶9.

"Future costs"

Exhibit 19(b)(2) to the Petition states that the minor's settlement funds of $10,303.38 will also be used for any "future costs associated with the January 18, 2012 accident until the minor reaches the age of majority." *See Exhibit ¶19(b)(2)*. The Court's concern here what these future costs refer to and the possibility of future liens, medical or otherwise, affecting the minor's final settlement amount.

In approving a compromise on a minor's behalf pursuant to Probate Code §3600, the Court shall make a further order authorizing and directing that reasonable expenses, medical or otherwise and including reimbursement to a parent, guardian, or conservator, costs, and attorney's fees, as the court shall approve and allow therein, shall be paid from the money or other property to be paid or delivered for the benefit of the minor or person with a disability. Probate Code §3601(a) (emphasis added).

As the Court reads this statute, if the present compromise is to be approved by this Court, the Court must also make some determination as to how all medical and other expenses will be paid for the minor's benefit, and that the amounts directed to those expenses are reasonable. If there are still expenses to be incurred as a result of the accident, the Court is obviously not in a position to determine the reasonableness of the minor's proposed settlement under Cal. Rules of Court, rule 7.950, and therefore cannot approve this Petition.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 5/24/12 .
(Judge's initials) (Date)

(23)

Tentative Ruling

Re: ***Arthur Semendinger v. California Department of Corrections, et al.***
Superior Court No. 08 CECG 03039

Hearing Date: Thursday, May 31, 2012 (**Dept. 403**)

Motion: Plaintiff Arthur Semendinger's Motion for Award of Reasonable Attorney's Fees and Costs

Tentative Ruling:

To GRANT Plaintiff's motion for award of reasonable attorney's fees and costs in the total amount of $19,136.55. (42 U.S.C. §§ 1988 and 1997e(d).)

To ORDER that $1.00 of Plaintiff's judgment be applied towards the $19,136.55 post-judgment attorney's fees and costs award. To ORDER that Defendants are responsible for $19,135.55 of the award. (42 U.S.C. § 1997e(d)(2).)

To ORDER Plaintiff's counsel to prepare and file within 5 court days an amended judgment on the appropriate Judicial Council form reflecting an amended judgment in the total amount of $219,454.66 -- $189,999 in damages, $29,135.66 in attorney's fees, and $320.00 in costs.

Explanation:

Plaintiff Arthur Semendinger moves for a post-judgment award of attorney's fees and costs in the amount of $29,906.23 pursuant to 42 U.S.C. § 1988. 42 U.S.C. § 1988(b) provides, in relevant part: "In any action or proceeding to enforce [42 U.S.C. § 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs[.]" However, 42 U.S.C. § 1997e(d) "impose[s] 'substantial restrictions' on § 1988(b) attorney's fee awards to prevailing prisoner-plaintiffs." (*Shepherd v. Goord* (2d Cir. 2011) 662 F.3d 603, 606.) Pursuant to Section 1997e(d)(1), a prevailing prisoner-plaintiff can only obtain an award of fees if: (1) "the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [section 1988]"; and (2) either "the amount of the fee is proportionately related to the court ordered relief for the violation" or "the fee was directly and reasonably incurred in enforcing the relief ordered for the violation." (42 U.S.C. § 1997e(d)(1)(A)-(B).)

Plaintiff contends that he is entitled to an award of reasonable post-judgment attorney's fees because the Plaintiff has prevailed in the action as a whole, both at the trial court level and on appeal, federal law provides that

attorney's fees can be awarded for collection and appeal efforts, and the amount of fees is reasonable. On the other hand, the Defendants contend that Plaintiff is not entitled to an award of post-judgment attorney's fees pursuant to 42 U.S.C. §§ 1988 and 1997e(d) for three reasons.

First, Defendants argue that Plaintiff is not entitled to an award of post-judgment attorney's fees because, since Plaintiff only won by way of default, Plaintiff did not prevail on the merits and is not an actual "prevailing party" pursuant to Section 1988. Defendants state that *Talley v. District of Columbia* (D.D.C. 2006) 433 F. Supp. 2d 5 establishes that, where a judgment is obtained by default, a plaintiff cannot be a "prevailing party" because no fact-finder ever found that a defendant violated the plaintiff's constitutional rights.

However, *Talley* is distinguishable from this case because, here, the Court did not award the Plaintiff nominal damages based solely on the Defendants' defaults and regardless of the fact that the Court had found that the Defendants had done nothing wrong. Rather, in this case, the declarations filed in support of Plaintiff's default damage prove-up hearing establish that both Defendants had a role in delaying Plaintiff necessary medical care and, thus, were both deliberately indifferent to the Plaintiff's serious medical needs. (*Semendinger v. Cal. Dept. of Corr. & Rehab.*, 2012 Cal. App. Unpub. LEXIS 814, at *2, *11.) Thus, after finding that Plaintiff's Eighth Amendment guarantee against cruel and unusual punishment had been violated by the Defendants and that Plaintiff had suffered an actual injury caused by the denial of adequate medical care, the Court awarded Plaintiff $190,000.00 in compensatory damages. (*Carey v. Piphus* (1978) 435 U.S. 247, 254-55, 264-66 [holding that compensatory damages can only be awarded when plaintiff proves that a deprivation of constitutional rights has caused actual injury to plaintiff].) Therefore, since the Plaintiff won on the merits of his lawsuit and obtained a judgment for $190,000.00 in compensatory damages, the Court finds that Plaintiff is a "prevailing party" pursuant to 42 U.S.C. § 1988. (*Farrar v. Hobby* (1992) 506 U.S. 103, 111-13.)

Second, Defendants argue that Plaintiff is not entitled to an award of post-judgment attorney's fees because, since Plaintiff won by way of default, the attorney's fees were not "directly and reasonably incurred in proving an actual violation of the Plaintiff's rights". (42 U.S.C. § 1997e(d)(1)(A).) Specifically, the Defendants argue that the post-judgment attorney's fees were only incurred in upholding the clerk's entry of default and the subsequent court judgment on default and that, by winning the appeal, the Plaintiff simply succeeded in proving that the entry of default against each Defendant was proper.

However, as discussed above, regardless of the fact that the judgment was a default judgment, the Plaintiff proved at the default damage prove-up hearing that his Eighth Amendment right to adequate medical care was violated and that Defendants had a role in delaying necessary medical care for Plaintiff. Therefore, the Court finds that the hours spent by Plaintiff's attorney on successfully opposing the Defendants' motion for new trial and on prevailing on

appeal were hours spent on proving or affirming that the Plaintiff's constitutional rights were actually violated. (*Riley v. Kurtz* (6th Cir. 2004) 361 F.3d 906, 916 ["We hold that a prisoner who prevails on appeal is entitled to attorney's fees under the PLRA [42 U.S.C. § 1997e(d)] because the hours were part of proving or making certain an actual violation of the prisoner's rights."]; *see also Webb v. Ada County* (9th Cir. 2002) 285 F.3d 829, 841.) Further, case law is also clear that reasonable attorney's fees for litigating a claim for entitlement for attorney's fees under 42 U.S.C. § 1988 are recoverable under 42 U.S.C. § 1997e(d)(1)(A). (*Jackson v. State Bd. of Pardons & Paroles* (11th Cir. 2003) 331 F.3d 790, 798-99.) Consequently, the Court determines that all of the attorney's fees sought by Plaintiff's counsel for opposing post-judgment motions, opposing the Defendants' appeal, bringing this motion for attorney's fees, and attempting to enforce the judgment are all recoverable under 42 U.S.C. § 1997e(d)(1)(A).

Third, Defendants argue that Plaintiff is not entitled to an award of post-judgment attorney's fees because the trial judge denied Plaintiff's previous motion for pre-trial and trial attorney's fees pursuant to 42 U.S.C. § 1988. It is true that the Court's January 12, 2010 order states that: "An award of attorneys fees against defendants is not allowed under 42 USC 197e(d)(2), since plaintiff's counsel was not appointed by the court." However, the Court did not actually deny Plaintiff's request for pre-judgment attorney's fees pursuant to 42 U.S.C. § 1988. In fact, in the next paragraph of the January 12, 2010 order, the Court awarded Plaintiff's counsel $10,000.00 in attorney's fees, to be paid out of the Plaintiff's judgment. The Court's reference to "42 USC 197e(d)(2)" meant that the Court was exercising its discretion pursuant to 42 U.S.C. § 1997e(d)(2) to have all of the $10,000.00 attorney's fee award, which was 5% of the judgment, be paid out of the Plaintiff's judgment and, thus, the Defendants would not have to pay any of the award for pre-judgment attorney's fees. Since the Court did not deny the Plaintiff's request for pre-judgment attorney's fees, the Court's January 12, 2010 order does not bar Plaintiff's request for post-judgment attorney's fees pursuant to 42 U.S.C. § 1988.

As the Plaintiff has demonstrated that the attorney's fees were "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and "the amount of the fee is proportionately related to the court ordered relief for the violation," the Court grants Plaintiff's motion for an award of reasonable attorney's fees and costs. (42 U.S.C. §§ 1988(b) and 1997e(d)(1).)

The Plaintiff seeks $29,906.23 in total post-judgment attorney's fees and costs. Initially, the Plaintiff and Defendants agree that Plaintiff's counsel's hourly rate of $169.50 is reasonable. Next, while the Plaintiff seeks compensation for 170.7 hours of work, the Court finds that some of the hours billed by Plaintiff's counsel are unreasonable. To start with, the Court reduces the requested time by 21.2 hours for work performed that was clerical in nature. (*See Davis v. City of San Francisco* (9th Cir. 1992) 976 F.2d 1536, 1543.) Next, the Court finds that some of the time billed is either excessive or duplicative and the Court disallows the following: (1) 7 hours for work performed in regards to the Defendants' motion for new trial; and (2) 50.8 hours for work performed in regards to reviewing the

opening brief, preparing the respondent's brief, and preparing and conducting oral argument. Finally, while the Defendants object to the Plaintiff's counsel's request for full attorney's fees for time spent travelling and argue that the travel time should be reduced to 50% of Plaintiff's counsel's hourly rate, the Court determines that, since it is the practice within the local legal community to charge fee-paying clients for full attorney rates for travel time, the Plaintiff's request for travel time to be compensated at the full attorney's rate is proper. (*Id*.)

Therefore, the Court determines that Plaintiff is entitled to an award of post-judgment attorney's fees and costs in the amount of $19,136.55 [112.9 hours at $169.50 per hour]. Furthermore, as the Court required Plaintiff to pay all of the pre-judgment attorney's fees and costs award out of his judgment, the Court directs that only $1 of the Plaintiff's $190,000.00 judgment be applied towards the $19,136.55 award of post-judgment attorney's fees and costs. (42 U.S.C. § 1997e(d)(2); *Boesing v. Hunter* (8th Cir. 2008) 540 F.3d 886, 891-92.) Consequently, Defendants are responsible for paying $19,135.66.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/30/12.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Courtyard Financial, Inc. v. Division One Investment & Loan, Inc., et al.***, Superior Court Case No. 09CECG01639

Hearing Date: **May 31, 2012 (Dept. 403)**

Motion: Plaintiff's Motions for Leave to Amend Answer and to Compel Joinder of Additional Defendants

Tentative Ruling:

To deny both motions.

Plaintiff shall pay additional filing fees of $40 to be due and payable to the court clerk within 30 days of service of the minute order by the clerk. Gov. Code § 70617(a).

Explanation:

The motion to amend is denied because plaintiff makes no attempt to comply with Cal. Rules of Court, Rule 3.1324. A motion to amend a pleading must: (1) include a copy of the proposed amendment, (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located, and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. Cal. Rules of Court, Rule 3.1324(a).

The motion satisfies none of these requirements. The motion does not include a copy of the proposed amended pleading, and does not specify anywhere what additional matters are to be asserted in the amended pleading.

In addition, a declaration must accompany the motion which specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. Cal. Rules of Court, Rule 3.1324(b).

No such declaration is submitted with the motion. Moreover, the motion discusses a number of factual matters, many of which cannot be ascertained from the court file. In law and motion practice, factual evidence is supplied to the court by way of declarations. *Calcor Space Facility, Inc. v. Superior* Court (1997) 53 Cal.App.4th 216, 224. Statements made in unverified documents, such as memoranda of points and authorities, are not sufficient. *Id.* at 224. Court must disregard facts stated in unverified memo of points and authorities, unless

supported by reference to evidence presented in declarations or otherwise. *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578.

The motion to compel joinder of additional defendants is not timely. Any defect in parties has been waived. Nonjoinder of a party must be raised by demurrer or answer at the outset of the action, or the objection is waived. Code Civ. Proc. § 430.80; 430.10(d) [demurrer for "defect or misjoinder of parties"]. Nonjoinder has only been raised by way of the instant motion more than a year after defendants filed a general denial.

If a defendant only discovers the existence of the absent parties later in the litigation, the defendant should seek leave to amend the answer to raise nonjoinder as an affirmative defense. See *Bank of the Orient v. Superior Court* (1977) 67 Cal.App.3d 588, 595. If the objection was raised as a defense in the answer, the defendant may move the court any time prior to trial for an order compelling the joinder of the absent party. Code Civ. Proc. § 389(a); and see *Bank of the Orient, supra*, 67 Cal.App.3d at 595.

While defendants seek leave to file an amended complaint (which is not granted), the court cannot determine whether the amended answer will raise the nonjoinder issue [as no copy of the proposed pleading has been provided], and defendants make no showing that they had no knowledge of these defendants when they filed their denial so as to warrant relief from waiver.

Joinder of necessary parties is governed by Code Civ. Proc. § 389. Defendants only selectively quote from Code Civ. Proc. § 389(a), giving a misleading summary of its requirements. Defendants quote it as providing that a person should be joined as a necessary or indispensable party under Code Civ. Proc. § 389(a) if:

> (1) in his absence *complete relief cannot be accorded* among those already parties; or
> (2) the *disposition of the action in his absence* may (i) as a practical matter *impair or impede his ability to protect that interest* or (ii) subject *current parties to a risk of additional liability or inconsistent obligations*.

Code Civ. Proc. § 389(a) provides in full:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) **he claims an interest relating to the subject of the action** and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already

> parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

(Emphasis added.)

Section 389(a)(2) obviously does not apply as there is no indication that the defendants to be joined claim any interest relating to the subject of this action. Based on defendants' factual summary, it does not appear that they claim any interest in this action. So the question is whether or not complete relief can be accorded among those already parties.

Even if it is true that these "co-conspirators" were involved in providing false information for Kliner's loan application, that would not render them necessary parties. Plaintiff's claim is based on Division One and Pessar's misrepresentations on the loan documents regarding the number of properties that Klimer was applying to purchase. See Complaint ¶ BC-4. Falsification of employment records is not an issue in this matter. Defendants do not explain how Klimer and her co-conspirators' falsification of other information would relieve Division One of liability for its own breach and misrepresentations. Defendants fail to show how the parties to be joined acted in such a way as to cause defendants to take the action that plaintiff claims caused it harm and damage.

Even if the alleged co-conspirators did cause harm to plaintiff, joint tortfeasors are not necessary parties. Plaintiff may choose which tortfeasors to sue. *Countrywide Home Loans, Inc. v. Superior Court* (1999) 69 Cal.App.4th 785, 796-797. In this case, at most defendants indicate that the co-conspirators are joint tortfeasors with defendants, or that they directly defrauded defendants, in which case they may have their own claims against the co-conspirators.

Persons against whom no relief is sought cannot properly be joined as defendants. "[I]t is fundamental that a person should not be compelled to defend himself in a lawsuit when no relief is sought against him." *Pinnacle Holdings, Inc. v. Simon* (1995) 31 Cal.App.4th 1430, 1437 (internal quotes omitted); *Duffey v. Superior Court* (1992) 3 Cal.App.4th 425, 429. Plaintiff has no claim against the proposed defendants.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling Issued By: **MWS** (Judge's initials) **on** **5/29/12** (Date).

03

Tentative Ruling

Re: ***Reyna v. County of Fresno***
Case No. 10 CE CG 01368

Hearing Date: May 31st, 2012 (Dept. 402)

Motion: Defendants Kirby and Fetzer's Motion for Summary Judgment, or in the Alternative, Summary Adjudication

Tentative Ruling:

To grant the defendants' motion for summary adjudication as to the third cause of action against defendants Kirby and Fetzer. (CCP § 437c.)

Explanation:

Defendants Kirby and Fetzer move for summary judgment on the ground that they had no duty toward plaintiffs because the plaintiffs were injured by the negligence of an independent contractor hired by defendants, and the hirer of an independent contractor is not liable for torts committed by the contractor.

"Once it could be said, as a general rule, one who employs an independent contractor is not liable to third parties for the contractor's torts committed while acting within the scope of the contract. [Citations.] Today, however, the exceptions have so overwhelmed the 'general rule' it is more accurate to say the employer of an independent contractor will generally be held liable for the contractor's torts and that nonliability is the exception. [Citations.] The original common law rule is rarely applied outside of motor vehicle accidents. [Citation.]" (*Barry v. Raskov* (1991) 232 Cal.App.3d 447, 453.)

"[T]he decision whether to impose vicarious liability on the employer of an independent contractor should consider the degree to which the contractor's performance is observable by the employer [citation] and the degree to which the employer can influence the contractor to avoid wrongdoing. [Citation.]" (*Id*. at 454.)

" 'The idea responsible for this general rule of nonliability is the want of control and authority of the employer over the work, and the consequent apparent harshness of a rule which would hold one responsible for the manner of conducting an enterprise over which he wants the authority to direct the operations. Again so far as the activity immediately causing the injury is concerned, it is the contractor rather than the contractee who is the entrepreneur and who should ordinarily carry the risk. . . .' " (*Snyder v. Southern California Edison Co*. (1955) 44 Cal.2d 793, 799, quoting Harper, Law of Torts (1933) § 292.)

Thus, if the hirer of the independent contractor did not control the independent contractor's work, or do anything to affirmatively increase the risk the injury, the hirer is not liable for injuries caused by the independent contractor. (*Zamudio v. City & County of San Francisco* (1999) 70 Cal.App.4th 445, 455.)

Also, under the California Supreme Court's holdings in *Privette v. Superior Court* (1993) 5 Cal.4th 689 and *Toland v. Sunland Housing Group, Inc*. (1998) 18 Cal.4th 253, an employee of an independent contractor cannot sue the hirer of the contractor for injuries sustained by the employee caused by the contractor's negligence while working on a project for the hirer. (*Privette, supra*, at 702; *Toland, supra*, at 267-268.) The rationale for this rule is that it would be unfair to impose greater liability on the hirer, who has done nothing to cause the injuries, than on the independent contractor, who is presumably primarily responsible for the worker's injuries, and whose exposure is limited to providing workers' compensation coverage. (*Toland, supra*, at 267-268.)

However, where the hirer retains control over the operative details of the work for which the independent contractor is hired, the hirer may still be held liable for the employee's injuries if the exercise of retained control affirmatively contributed to the harm. (*Zamudio, supra*, 70 Cal.App.4th at 453.)

For example, in *McKown v. Wal-Mart Stores, Inc*. (2002) 27 Cal.4th 219, the California Supreme Court held that a hirer of an independent contractor was liable for injuries to an employee of the contractor to the extent that the hirer's provision of unsafe equipment affirmatively contributed to the employee's injury. (*Id*. at 222.)

In *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198, the Supreme Court held that the hirer of an independent contractor is not liable to an employee of an independent contractor merely because the hirer retained control over safety conditions at the worksite, but that the hirer is liable to the extent that the hirer's exercise of retained control affirmatively contributed to the employee's injuries. (*Id*. at 211-212.) In other words, the hirer was being held directly liable for its own negligence in failing to exercise its retained control in a reasonable manner, rather than being held vicariously liable for the negligence of the independent contractor. (*Ibid*.)

On the other hand, the Supreme Court has found that the *Privette* doctrine bars suits by employees of an independent contractor against the hirer based on the theory that the hirer was negligent in hiring the contractor. (*Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1244-1245.) "[A]n employee of a contractor should be barred from seeking recovery from the hirer under the theory of negligent hiring set forth in section 411. …'[I]t would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage.' [Citation.]" (*Id*. at 1244.)

Recently, in *Seabright Ins. Co. v. U.S. Airways, Inc.* (2011) 52 Cal.4th 590, the Supreme Court held that, even where the hirer is under a statutory duty to provide a safe workplace and fails to do so, an employee of the independent contractor cannot sue the hirer for negligence because the statutory duty is implicitly delegated to the independent contractor. (*Id*. at 594, 597.)

Here, defendants have met their burden of presenting evidence showing that Gonzalez and his company were independent contractors rather than agents or employees of Kirby and Fetzer, and that it was the negligence of Gonzalez or his servant Pascual that caused plaintiffs' injuries.

"The most important factor in determining whether one is an agent or independent contractor is whether the principal has the right to control the manner and means of accomplishing the result desired. If the principal has the authority to exercise complete control, whether or not that right is exercised with respect to all details, a principal-agent relationship exists." (BAJI 13.20.)

Other factors to be taken into consideration in determining whether a person is an agent or independent contractor are:

(a) Whether the one performing services is engaged in a distinct occupation or business;

(b) Whether, in the locality, the kind of occupation or business is one in which the work is usually done under the direction of a principal or by a specialist without supervision;

(c) The skill required in the particular occupation or business;

(d) Whether the principal or the worker supplies the instrumentalities, tools and the place of work for the person doing the work;

(e) The length of time for which the services are to be performed;

(f) The method of payment, whether based on time or by the job;

(g) Whether the work is part of the regular business of the alleged principal; and

(h) Whether the parties believe they are creating a relationship of agency or independent contractor. (*Ibid*.)

In the present case, the distributorship agreement between Kirby and Gonzalez clearly states that Gonzalez was an independent contractor of Kirby, and that there was no agency or employee relationship between Kirby and Gonzalez. (Exhibit A to Nichols decl., Distributorship Agreement, p. 6, ¶ 13(a) and

13(b).)[1] The agreement also states that the distributor, Gonzalez, shall be solely responsible for the conduct and sales technique of his dealers, distributor trainees, and employees. (*Id*. at p. 4, ¶ 7.) In addition, the agreement states that the distributor shall indemnify Kirby from any and all liability, damage or expense incurred by it in connection with any claim, demand or suit based in whole or in part on the distributor's acts or omissions, including the alleged negligence of the distributor, his sales force or employees. (*Id*. at p. 5, ¶ 9(b).)

Also, Gonzalez admitted in his deposition that he was an independent contractor under the distributorship agreement. (Exhibit B to Beltramo decl., Gonzalez depo., pp. 101:15-25; 102:1.) He admitted that he had the exclusive right to recruit, hire, train, terminate and compensate all of his independent dealers, employees and agents. (*Id*. at p.102:5-10.) He testified that the dealers were also independent contractors, and that Pascual was an independent contractor as well. (*Id*. at 102:12-19.) Kirby was not involved in hiring Pascual. (*Id*. at p. 102:22-24.)

Under the distributorship agreement, Gonzalez was solely responsible for paying for background checks of dealers. (*Id*. at pp. 40:10 – 41:2.) Gonzalez also understood that he was required to perform, at a minimum, criminal background checks of potential dealers who might enter a consumer's home. (*Id*. at pp. 41:25 – 42:17.) However, Gonzalez failed to conduct such a background check on Pascual. (*Id*. at p. 71:21 – 72:8.) He also failed to conduct background checks consistently on his other dealers. (*Id*. at p. 48:5-11.) Nevertheless, Gonzalez continued to execute certifications every year, falsely telling Kirby that he had conducted background checks of all of his dealers. (*Id*. at p. 103:11-20, and Exhibits E, F, and G to Beltramo decl..)

As it turned out, Pascual had three prior felony convictions for grand theft and assault by means of force. (*Id*. at p. 72:23 – 73:2.) Gonzalez would not have hired Pascual if he had known of Pascual's prior felonies. (*Id*. at p. 73:21-24.)

Defendants have also presented evidence that Gonzalez provided all of the equipment and tools used by him in his sales, which tends to show that Gonzalez was acting as an independent contractor. (BAJI 13.20(d).) In particular, defendants point out that Gonzalez was the registered owner of the van in which plaintiffs were riding when they were injured, and he had the sole responsibility for maintaining it. (Gonzalez depo., p. 30:11-13; 102:25-103:1-3.) Gonzalez also had ownership and control over his distributorship business until he shut it down due to the poor economy. (*Id*. at pp. 11:10 - 15:20.) Therefore, defendants have met their burden of showing that Gonzalez and Pascual were acting as independent contractors at the time of the accident, and thus Kirby and Fetzer cannot be held liable for the contractor's negligence unless they

[1] Plaintiffs have objected to various items of defendants' evidence. The court will sustain objections 1, 2, 3, 12, and 16, and overrule the rest. However, this does not affect the outcome of the motion.

retained control over Gonzalez's work, and that exercise of control affirmatively contributed to plaintiff's injuries. (*Hooker, supra*, 27 Cal.4th at 211-212.)

Plaintiffs argue in opposition that defendants negligently retained control over Gonzalez's distributorship by requiring Gonzalez to conduct background checks of his dealers, but then failed to take reasonable measures to ensure that Gonzalez was actually conducting the background checks. If defendants had taken such steps, plaintiffs argue, Gonzalez would have conducted a background check on Pascual and would have refused to hire him as a dealer when he learned of Pascual's criminal record.

However, this argument appears to be merely a variation of the negligent hiring theory rejected by the California Supreme Court in *Camargo v. Tjaarda Dairy, supra,* 25 Cal.4th 1235. In other words, plaintiffs are arguing that defendants were negligent in allowing Gonzalez to hire Pascual by failing to make sure that Gonzalez conducted a background check of Pascual. Yet a hirer cannot be held liable for injuries to an employee of an independent contractor caused by the negligent hiring of the contractor. (*Camargo, supra*, at 1244-1245.) If Gonzalez cannot be held liable for negligently hiring Pascual, who was an independent contractor, then Kirby and Fetzer also cannot be held liable for allowing Gonzalez to hire Pascual.

Plaintiffs argue that Kirby retained control over other aspects of Gonzalez's distributorship, such as dictating how Gonzalez was to sell Kirby products, what measures he would take to mitigate the risk of harm posed by the door-to-door sales method mandated by Kirby, requiring Gonzalez to obtain minimal auto insurance, etc. However, plaintiffs have failed to show that this retained control had any causal relationship to the harm suffered by plaintiffs. A hirer is only liable for negligently exercising retained control over the independent contractor to the extent that the exercise of retained control actually contributed to the employee's injuries. (*Hooker v. Dept. of Transportation*, *supra*, 27 Cal.4th at 210-212.)

Here, plaintiffs have not pointed to any evidence that Kirby's alleged retained control over the way that Gonzalez sold Kirby products actually caused the plaintiffs' injuries. At most, plaintiffs have pointed to facts showing that Kirby failed to take measures to ensure that Gonzalez conducted background checks on his potential dealers. Again, this appears to be nothing more than a negligent hiring theory, which cannot be the basis of liability. (*Camargo, supra*, 25 Cal.4th at 1244-1245.) In essence, plaintiffs are arguing that Kirby had a duty to make sure that Gonzalez did not negligently hire his independent contractors. However, under *Camargo*, neither Gonzalez nor Kirby have such a duty to avoid negligently hiring an independent contractor to prevent injuring the employees of the independent contractor. Plaintiffs have not pointed to any other facts showing that the alleged retained control over the way Gonzalez sold Kirby products caused or contributed to plaintiffs' damages. Therefore, plaintiffs have

failed to raise a triable issue of material fact as to duty or causation, and the court intends to grant summary judgment as to Kirby and Fetzer.[2]

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 5/30/2012 .

(Judge's initials) (Date)

[2] Defendants have also argued that Fetzer cannot be held liable because it is merely the parent company of Kirby, which is a wholly owned subsidiary, and that it has no liability for Kirby's negligence in the absence of evidence of alter ego liability. However, this argument is belied by the fact that Kirby's person most knowledge admitted in his deposition that Kirby is merely an unincorporated division of Fetzer, and has no separate legal existence. (Exhibit I to Plaintiffs' Evidence, Sminchak depo., p. 138:10-23.) Therefore, the court cannot grant summary judgment for Fetzer based on the theory that Fetzer is a separate entity from Kirby. However, since both companies are the same legal entity, and since Kirby had no duty to ensure that Gonzalez did not negligently hire Pascual, Fetzer has no separate liability either.

Tentative Ruling

Re: ***American Express Bank, FSB v. Lawrence***
Superior Court Case No. 11CECG02103

Hearing Date: May 31, 2012 (**Dept. 403**)

Motion: By plaintiff for summary judgment

Tentative Ruling:

To grant.

Explanation:

The supporting declaration and the exhibits attached thereto support the ten facts offered in relation to each of the two common counts. Defendant has filed no opposition showing any of those facts to be in dispute.

Plaintiff is therefore entitled to judgment in the principal amount of $39,271.58, along with 10% legal interest from the date of filing (June 16, 2011) through the date of judgment (May 31, 2012) in the amount of $3,763.19.

Plaintiff is also entitled to recover costs of $959.50, as set out in the cost memorandum.

The court will therefore sign the proposed judgment submitted with the moving papers. No appearance is necessary.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS (Judge's initials) on 5/30/12 (Date).

[25] **Tentative Ruling**

Re: ***Rios, et al. v. Sanders, et al.***
Superior Court Case No. 11CECG02342

Hearing date: May 31, 2012 (Dept. 503)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Hearing off calendar.

Pursuant to California Rules of Court, rule 391, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 5/29/12 .
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Danielson v. La Jolla***
Superior Court Case No. 08CECG04387

Hearing Date: May 31, 2012 (Dept. 502)

Motion: by plaintiffs for class certification.

Tentative Ruling:

To grant certification, and appoint plaintiffs' counsel as class counsel and the individually named plaintiffs (but for Leslie Danielson) as class representatives. To order that the parties meet and confer as to a proposed notice to the class, and set a hearing on that issue for June 28, 2012. To order that the parties submit either a joint proposed order on class notice or competing proposed orders on or before June 14, 2012. Class counsel need provide a declaration as to the entity proposed for giving notice on or before that date as well.

To also order that defendants make a motion to seal the Kleim Declaration filed on 4-17-2002, and that they file a copy of same with the Social Security Number in Exhibit D redacted. Such motion shall be filed on or before June 15, 2012. The hearing will be held on same on June 28, 2012.

Explanation:

1. Objections

The Court has not considered the numerous individual objections made by the parties to various items of evidence provided for this motion. The Court did accord the declaration of Mr. Kleim little weight as he is shown by the motion not to be a witness with personal knowledge of much of what he relates. The Court did not consider the "sampling" arguments at all; the foundation for same was not given and no expertise has been shown in statistical or mathematical sciences by the declarant.

The Court also did not give much weight to the individual claimants' descriptions of what they might or might not have done given different scenarios; there is no fraud claim and such evidence is therefore not of much importance to certification as opposed to standing. "A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is only necessary to show that members of the public were likely to be deceived." *Podolsky v. First Healthcare Corporation* (1996) 50 Cal. App. 4th 632, 647-648. "It is not necessary to show that the defendant intended to harm anyone since a violation of the UCA is a strict liability offense." (*Id.* at 647.) Such statements are useful for individual standing purposes.

2. Standing Arguments

The prime questions here are whether or not La Jolla can charge for repairs not done, or not done in a timely fashion after a renter left, and whether it can avoid the law on a security deposit by taking a deed of trust instead of cash. There is no dispute that each of the class members is claimed by La Jolla to currently owe La Jolla money – that La Jolla contends each is indebted to La Jolla.

A debt is a legal claim for money owed. La Jolla claims ownership in certain monetary amounts in the possession of each class member. In *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069, 1090, the Supreme Court found that the named class representative in a proposed class action "has standing to seek a declaration that Fireside Bank is unlawfully asserting a debt against her[,]"because it made "an unlawful demand for payment." That is the crux of the wrongful conduct complained of by the plaintiffs in this case. In *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 167, it was a debt owed to the plaintiffs – wages not paid.

Here, claimants present publically recorded deeds of trust for an amount securing a year of rent. If such constitutes an impermissible security deposit, then a public cloud on title is a harm by any standards. The other claimants live under the cloud of a continuing demand for payment of debts they contend are unlawful. There is no dispute that defendant claims an ownership right in money that plaintiffs also claim is theirs.

The one exception would be Leslie Danielson, but for a different reason. Ms. Danielson gave notice that she has filed for bankruptcy. Her claim therefore belongs to the bankruptcy trustee; she has no standing to prosecute this action.

3. Merits Arguments

Defendants' argument that plaintiffs have no viable claim is not a viable argument in opposing a class action. A class action resolution can, and often does, favor a defendant, who then derives the benefit of resolving the claims of the many in one case.

> "It is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff."

Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal. 4th 1004, 1034.

For example, the question of whether or not the guarantors have claims under certain landlord-tenant statutes is exactly the type of question a class action is designed to resolve. The fact that it might be resolved in favor of the landlord is no reason to deny the landlord this benefit. Whether or not the submission of a deed of trust/promissory note is a "security deposit" under the law or not is another fine question for common resolution, and one which defendants feel sure will favor their cause in the end. As noted by defendant, "none" of the tenant class members made what defendants contend can be such a deposit as defined by law, thus establishing a uniform factual and legal question.

The argument that defendant will win has no effect on class status.

3. Class Certification

a. Standards

The burden of proof for a party asserting class certification is appropriate is preponderance of the evidence. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 322. See also *Richmond v. Dart Industries, Inc*. (1981) 29 Cal. 3d 462, 470, holding that a ruling on certification is subject to the "substantial evidence" test. And see *Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 96-97:

> "Code of Civil Procedure section 382 authorizes class actions when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."
>
> "Trial courts are accorded great discretion in granting or denying certification . . . As the focus in a certification dispute is on what type of questions—common or individual— to arise in the action, rather than on the merits of the case, in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment."

b. Predominance of Common Questions

i. Parol Evidence Issue

La Jolla argues that interpretation of its "credible lender" language would require mini-trials due to the need for evidence of each individual transaction. However, the declarations from each person at La Jolla, Kleim, Bowden, Walters, and Zambrano, all state that not a single tenant and/or guarantor ever said anything to them about the "credible lender" language. That confirms that any understandings, musings, etc., of the tenants and/or guarantors would be ***uncommunicated*** to La Jolla.

Subjective, undisclosed intent is irrelevant to establishing the terms of the contracts or their breach. *Winet v. Price* (1992) 4 Cal.App.4th at p. 1166, fn. 3; *California Teachers' Assn. v. Governing Bd. of the Hilmar* (2002) 95 Cal. App. 4th 183, 189, fnt. 3. La Jolla's evidence on this issue establishes that to the extent parol evidence is offered to show the meaning of the term, that parol evidence will not include individual testimony from the tenants or guarantors.

To the extent it is an FHA term, and adopted by La Jolla for that reason, that might be admissible as a term used in the trade – the trade of real estate dealing. See Code of Civil Procedure section 1856(c). For class action purposes, the concern over parol evidence is not supported by the statements made by La Jolla in opposing this motion. Evidence from the drafter of a standardized pre-printed contract is permissible in class cases. Where there is ambiguity, the Court is to look at the ***objectively*** reasonable expectations of the non-drafting party, not their subjective individual thoughts. *Kavruck v. Blue Cross* (2003) 108 Cal. App. 4th 773, 782.

Numerous times in the declaration of Mr. Kleim he refers to advice of counsel as a basis for certain actions or use of certain documents or language therein. Where such is the basis for use of a given contract term, it can readily presented with the testimony of La Jolla's counsel and the personal who made the decision to institute the advice – no tenant or guarantor information is required. But La Jolla will have the same problem here – advice of counsel is "subjective, uncommunicated" intent, never revealed to the other side here – the tenants/guarantors.

ii. Cross-Claims and Offsets

La Jolla states that it has cross-claims and offsets against tenants and/or guarantors, and that these would necessarily reduce the case to hundreds of individual trials. The sole cross-complaints are against the actual named plaintiffs. As for off-sets, those do not exist unless the class claims prevail and there is something to "offset" against. Where a UCL claim is at issue, equity is the judge of remedies. The existence of offsets might color the Court's choice of remedies.

Further, whether or not such offsets are proper or lawful would present a common question depending on the offset sought. It appears here that the offsets also consist of items of damage, rent, repair costs, etc., that are maintained in La Jolla's books. La Jolla's arguments on this point deal more with the amount of restitution/damages for class members, not with liability or what kinds of remedies are proper.

"As a general rule, if defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." *Brinker Restaurant Corp. v. Superior Court, supra*, 53 Cal. 4th at 1022. And see *In Re Cipro* (2004) 121 Cal. App. 4th 402, 417, (internal quotes and citations omitted):

> "If the defendant in a class action is found liable, and there is a finding at trial as to the amount of classwide damages, each class member's individual entitlement to damages may be litigated in a nonadversary administrative claims procedure with a lowered standard of proof. In such a claims procedure, the allocation of the total sum of damages among the individual class members is an internal class accounting question that does not directly concern the defendant. A class action which affords due process of law to the defendant through the time when the amount of his liability is calculated cannot suddenly deprive him of his constitutional rights because of the way the damages are distributed."

The questions of liability and remedy for the class, as well as of the viability of a category of offset, predominate over theoretical issues of individual offset amounts.

iii. Common Questions Predominate

The focus of this matter is the actions and practices of defendant, its standardized contracts and their interpretation, its admitted practice with regard to pre-termination inspection notices, its admitted practice in not providing documentation of actual repairs done, and whether plaintiffs correctly characterize the deed of trust as a "security deposit."

> "Controversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply to each contract, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party."

La Sala v. Amer. Sav. & Loan Assn. (1971) 5 Cal. 3d 864, 877.

In *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal. App. 4th 385, the issue was the meaning of a term in the insurance contract: "accelerated premium."[3]

Interpretation of statutory language as it is applied to a common set of facts is another situation where a class action is found appropriate. See *Morgan v. United Retail Inc.* (2010) 186 Cal. App. 4th 1136 – where the defendant prevailed over the class on a statutory issue. Such statutory issues abound in this matter.

c. Adequacy

California law holds that, so long as the claims are typical and the class representative displays willingness to engage in the discovery and other requirements of litigation, "the adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *McGee v. Bank of America* (1976) 60 Cal. App. 3d 442, 487.

La Jolla does not dispute that proposed class counsel is adequate to the task at hand.

No conflicts appear between named class representatives; all have serious stake in the outcome of the case.

d. Typicality

Wershba v. Apple Computer, Inc. (2001) 91 Cal. App. 4th 224, 238: "The fact that the class representatives had not personally incurred all of the damages suffered by each different class member does not necessarily preclude their providing adequate representation to the class."

There is no dispute over the number of rental units (200) or the number of tenancies in those units during the proposed class period (over 500). While defendant raises some issues over a few happy tenants, etc. (such as "independent contractor" Zambrano), it does not make any evidentiary showing that there are insufficient numbers of persons are in each class to warrant class treatment.

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[3] Also of interest in that opinion is the fact that GMAC argued damage was not provable as a class, since it contended that the insureds owed GMAC more than GMAC might be ordered to pay them – offsets. The trial court dealt with that issue by bifurcating liability and damages, and then reviewing the individual totals shown. The Court of Appeal also upheld that ruling. (*Id*. 396-397.)

The only attack on a class representative is the dispute over whether a letter to the Zambranos included notice of a right to pre-termination inspection. Exhibit 3 to plaintiff Garcia's declaration is that notice. It was in response to a specific written request for a pre-move out inspection made by the Zambranos – see Exhibit 2 to Garcia's declaration. The Zambranos vacated after this lawsuit was filed, in September of 2008. All this would do is take out the Zambranos and Garcia as class representatives for the pre-termination inspection violation class. Those who were evicted are not part of that class, Class II, as it is limited to voluntary termination by a tenant.

The definition for Class I is not completely clear until one reads the papers. It in fact only includes those whose real property was subjected to a deed of trust to guarantee a lease. This class is represented by John and Rosemary Roberts, Pet Ochoa, Pedro Maciel, and David Garcia. Mr. Garcia's claim is different only in that the deed of trust he gave was allegedly extinguished by sale by a higher priority lien holder. That only affects his remedy though, which does not matter under *Wershba*.

Class II consists of those lessees who voluntarily terminated, were charged for repairs, and were not given notice of a pre-termination inspection right. The named representatives of this class are Pete Ochoa with Espinosa and Reynosa, Steve Danielson, and the Roberts, Omitted are Maciel with Marzett and Gutierrez (evicted) and the Zambranos with Garcia (pre-inspection done).

Class III consists of all charged for repairs who were not given copies of documents prepared by those who completed the work within 21 days of the date they vacated. All named plaintiffs are representatives of this class, as La Jolla admits it did not do repairs either at all, or until shortly before a new tenant moved in.

Class IV is all who were charged for repairs and whose Addendum A had the "credible lender" language. Each of the named plaintiffs is a representative of this class, as all Addendum As for their leases had this language.

e. Superiority

Numerosity is not questioned by La Jolla. The ability to ascertain who is in each class is found in the evidence of the record keeping practices of La Jolla, from the property management computer program and the tenant files. While there has not been a flood of lawsuits, there is the fact that we appear to be dealing with classes of persons who are unsophisticated in these matters, and therefore unlikely to initiate lawsuits. There is also the factor that the amounts are not large enough to attract counsel willing to work on a contingency basis for individual lawsuits. The ability to pay an attorney an hourly fee appears very unlikely.

La Jolla makes some arguments and provides some evidence it has ceased certain practices, but only after it was contacted by proposed class counsel and on notice of a likely lawsuit. It has not offered to stipulate to an injunction that it will not resume such practices as soon as the threat of litigation is gone. "A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth v. Laidlaw Environmental Services* (2000) 528 U.S. 167, 174.

"A defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." (*Id*. at 190.) La Jolla's arguments on this point actually tend to show a class action is appropriate, as the evidence shows complaints by many of the class representatives as individuals were unheeded. La Jolla took notice only in the face of joinder of many of its prior tenants and guarantors in a class action.

The superiority of the class procedure is established by the evidence presented in the papers for this motion.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **5-30-12**

Issued By: _____ on _____.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Ramirez v. Big Lots Stores***
Superior Court Case No. 12CECG00497

Hearing Date: May 31, 2012 (Dept. 502)

Motion: by plaintiffs for class certification and preliminary approval of class settlement.

Tentative Ruling:

To deny.

Explanation:

1. Class Certification

a. Standards

The burden of proof for a plaintiff asserting class certification is appropriate is preponderance of the evidence. *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 322. See also *Richmond v. Dart Industries, Inc*. (1981) 29 Cal. 3d 462, 470, holding that a ruling on certification is subject to the "substantial evidence" test. And see *Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 96-97:

> "Code of Civil Procedure section 382 authorizes class actions when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. The 'community of interest' requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class."
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> "Trial courts are accorded great discretion in granting or denying certification . . . As the focus in a certification dispute is on what type of questions—common or individual— to arise in the action, rather than on the merits of the case, in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment."

b. Adequacy

California law holds that, so long as the claims are typical and the class representative displays willingness to engage in the discovery and other requirements of litigation, "the adequacy inquiry should focus on the abilities of the class representative's counsel and the existence of conflicts between the representative and other class members." *Caro v. Procter & Gamble Co.* (1993) 18 Cal. App. 4th 644, 669. "Adequacy of representation depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." *McGee v. Bank of America* (1976) 60 Cal. App. 3d 442, 487.

Here, the parties appear to desire consolidating four cases into one. In a federal lawsuit, Plaintiff Baker has already lost his own motion for class certification, and defendant has won a motion to deny certification, as well as summary judgment on all of Baker's claims but for that regarding rest periods. We do not know why, because those motions and rulings are not provided. Here, Baker seeks an incentive of $5,000 while the rest of the 18,000 class members are to divide up $404,000 (the amount left after payment to the administrator, the PAGA penalty, and the class representatives' incentive awards). Mr. Baker has only an individual case in federal court for missed rest periods. He has a conflict of interest with other class members here in that he possesses only one of the claims made, and has already been ruled not to be able to prosecute a class action. The $5,000 incentive is approximately 222 times the $22.44 payout (on a per capita basis) to the other class members, and itself presents a potential conflict.

As for the other named plaintiffs, the Court is not provided with any evidence showing they have any of the claims asserted in the proposed First Amended Complaint. Conflict appears where the proposed class representatives are to receive a prize hundreds and hundreds of times more valuable than those they represent, as such an incentive may minimize the representative's interest in maximizing class recovery. The disparity between the class' recovery and that for class representatives is so striking here, given the lack of evidence of the merit of the representatives' claims, as to present a conflict under the current state of the evidence.

The record presented is devoid of evidence which would permit a finding that the proposed representatives are adequate to the task. It does, however, contain evidence of conflict, as just discussed. Class counsel also has failed to provide any evidence of adequacy of representation. None of the orders claimed to be favorable to the firm's clients are presented with the declaration asserting the firm's capabilities, and there is therefore no admissible showing of adequacy.

c. Typicality

The above also demonstrates the impact the lack of evidence in showing the named plaintiffs' claims are typical of those held by other class members. None of the claimed uniform policies or practices are set forth, indeed, there is no evidence of any practices at all. No job titles are given, nothing is said about the unpaid overtime claims, no wage stubs are provided, no discussion of payment of wages on termination, no facts about seating problems, are provided. There is a complete evidentiary void as to the claims of the named plaintiffs, or of the parameters of the class proposed.

Describing the class as those who are "non-exempt" without more renders it impossible to determine on the record before the Court who might or might not be included and on what basis – income or tasks. See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319. The facts underlying the named representatives' claims are not presented, and therefore typicality of those claims with the claims of others cannot be found. *Hart v. County of Alameda* (1999) 76 Cal. App. 4th 766.

d. Predominance of Common Questions

As the claims of the named class representatives are not known or discussed by those persons, and as Baker's claims have largely been laid to rest, it is not possible to determine what questions are common even to the four named individuals, let alone the unnamed class members.

e. Conclusion

A court is not allowed to approve a class settlement absent actual proof of a properly certified class. The only difference in proof for class certification for settlement and class certification generally is that the first does not require proof of manageability for trial. But other than that, the burden of proof is on plaintiff, and must be met, whether certification is sought on its own or concurrently with settlement approval.

The reason for this is to ensure that due process is met. A class action is a procedural method for adjudicating, or settling, the claims of many via one case. However, the basis for permitting such adjudication or settlement is that the claims of the representatives are typical of the class, and that the representatives are scrutinized to ensure their interests and those of the class they seek to represent are sufficiently similar.

The leading case on this issue is *Amchem Products v. Windsor* (1997) 521 U.S. 591. The defendants in that case were companies facing asbestos liability, who wanted to completely, globally, settle all possible claims against them. The Court was mindful of the crisis such companies faced in terms of potential financial burdens inherent with liability on those claims. But it refused to allow the class certification, and therefore the settlement. The objectors to the

settlement contended that the named plaintiffs and certain unnamed class members had conflicts of interest, and that counsel did as well in seeking to represent all. This was because the named class members all had manifested injuries from asbestos exposure, while the class certified included persons who did not.

"We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification." (*Id*. at 619.) "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [citation omitted] for the proposal is that there will be no trial. But other specifications of the rule--those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context." (*Id*. at 620.)

The Court's role is more pronounced than the usual matter, as the Court is the guardian of the rights and interests of unnamed class members. See *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 129. Proof of all class certification requirements but for manageability is required under the United States Constitution. "The Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members." *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 812. The "clause" spoken of is the 14th Amendment to the U.S. Constitution, the same one that is used to question punitive damage verdicts. See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 712.

As the motion fails to offer proof, it is denied where it seeks class certification.

3. Proposed Class Settlement

In *Clark v. America Residential Services* (2009) 175 Cal. App. 4th 785, the Court of Appeal vacated approval of class settlement coupled with class certification, the award of $25,000 each to two named plaintiffs, and more. There were 20 objectors. The complaint was that the plaintiffs presented "no evidence regarding the likelihood of success on any of the 10 causes of action, or the number of unpaid overtime hours estimated to have been worked by the class, or the average hourly rate of pay, or the number of meal periods and rest periods missed, or the value of minimum wage violations, and so on." (*Id*. at 793.)

See also Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal. App. 4th 116, 129:

> "[I]n the final analysis it is the Court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing litigation. The

> court has a fiduciary responsibility as guardians of the rights of the absentee class members when deciding whether to approve a settlement agreement."
>
> "[T]o protect the interests of absent class members, the court must independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished . . . [therefore] the factual record must be before the . . . court must be sufficiently developed."
>
> (*Id*. at 130.)

The record here as to settlement is lacking. No estimate of overtime hours, missed meal break time, or missed rest periods, is provided, for any class representative or for the class as a whole. The seating claim and its value is not explained, but the sole settlement of same is an offer by defendant to "investigate." No discussion of termination pay policies or pay stub configuration appears, nor is any value assigned to those claims.

The settlement and notice to class discuss a federal case, not this one. The claim form to be signed by class members features a release under penalty of perjury for an extraordinarily broad group of claims, yet defendants are permitted to cancel the settlement after claims are submitted if a certain portion of opt-outs are received. Class counsel has rendered it next to impossible for there to be any objection to their fee request by allowing only 7 days to file an objection, despite the fact there is no benefit to the class from such a restriction.

Page 26, paragraph 28.d., requires a dismissal of this case with prejudice, which is barred by California Rules of Court, Rule 3.769(h). The Claim Form (also attached to the settlement) demands an answer to this question under penalty of perjury by the class member: "I am a U.S. person (including a U.S. resident alien)." No explanation for this strange representation is made.

The notice to the class also advises class members that the Court where the final fairness hearing will be held is the United States District Court for the Central District of California. They are told to travel to Los Angeles in order to review the Court file, which is here, in Fresno.

Perhaps the greatest concern is that two of the named class representatives have not even signed the settlement agreement and may not be parties to it. On the record before the Court, it appears that class counsel have paid little attention to many of the filings in this case, and may have meant to bring this motion elsewhere.

Confusion abounds, but it is clear that the proof required to approve a class action settlement is not in this Court's file in this case.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **5-30-12**

Issued By: _____ **on** _____.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Rosendahl v. City of Fresno***
Superior Court Case No.: 11CECG01124

Hearing Date: May 31, 2012 (**Dept. 403**)

Motion: By Defendant City of Fresno to compel Plaintiff to sign authorization to release records from the Employment Development Department and the State Disability Insurance Office and to require Plaintiff to produce W-2 forms for the previous 5 years

Tentative Ruling:

To deny.

Explanation:

The motion is procedurally defective in that it is not accompanied by a separate statement as required by California Rules of Court, rule 3.1345(a). There is no declaration saying when the responses were served in order for this court to even determine if the motion is timely, which is a jurisdictional issue. (Code Civ. Proc., § 2031.310, subd. (c).)

Further, no "good cause" is shown. To establish "good cause" for the production of documents, the burden is on the moving party to show both (1) relevance to the subject matter (how the information in the documents would tend to prove or disprove some issue in the case); and (2) specific facts justifying discovery (why such information is necessary for trial preparation or to prevent surprise at trial). (*Glenfed Development Corporation v. Superior Court* (1997) 53 Cal.App.4th 1113, 1137.)

The W-2 forms sought aren't even contained within the requests for documents that were served on Plaintiff Brian Rosendahl.

Even more fundamentally, requiring someone to sign a release is not within the scope of a demand under Code of Civil Procedure section 2031.010. The statute only provides for the inspection of documents and physical, tangible things, or to permit the propounding party to enter on land and do certain things. The statute does not have a mechanism whereby the propounding party can require the other party to sign authorizations; otherwise there would be no need to have authorizations.

Miranda v. 21st Century Insurance Company (2004) 117 Cal.App.4th 913, doesn't help Defendant City of Fresno at all. That case involved an appeal from

a dismissal as a terminating sanction in an underinsured motorist arbitration. The plaintiff there did not challenge whether or not the trial court had the authority to require her to sign authorizations for release of medical records. Her appeal was based on a superior court's subject matter jurisdiction over uninsured/underinsured motorist arbitrations at pp. 919-926), as well as whether the trial court had personal jurisdiction over the plaintiff (at pp. 926-927).

The correctness of the trial court's order requiring the plaintiff to sign authorizations was not ruled upon in *Miranda v. 21st Century Insurance Company*. The *ratio decidendi* is the principle or rule that constitutes the ground of the decision, and it is this principle or rule that has the effect of a precedent. (*Grant v. Murphy* (1897) 116 Cal. 427, 432.) "A decision is not even authority except on the point actually passed upon by the court and directly involved in the case." (*Hart v. Burnett* (1860) 15 Cal. 530, 598.) "Opinions are not authority for issues they do not consider." (*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 539.)

The motion is thus denied.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/30/12.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Crenshaw v. Orchard Supply Hardware, LLC et al.***
Superior Court Case No. 09 CECG 02786

Hearing Date: May 31, 2012 (Dept. 502)

Motion: Motion for Leave to File First Amended Cross-Complaint

Tentative Ruling:

To grant.

Explanation:

"The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading." (Code Civ. Proc. § 473; see also, § 576.) There is generally a strong policy in favor of allowing a plaintiff to amend the complaint. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776-777.) Judicial policy favors resolution of all disputed matters between the parties in the same lawsuit. Thus, the court's discretion will usually be exercised liberally to allow amendment of the pleadings. (*Nestle v. Santa Monica* (1972) 6 Cal.3d 920, 939; *Mabie v. Hyatt* (1998) 61 Cal.App.4th 581, 596.)

Also, the motion must comply with California Rule of Court rule 3.1324. Under this rule, a motion to amend must: (1) include a copy of the proposed amendment, (2) state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located, and (3) state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located. (Cal. Rule of Court, Rule 3.1324, subd. (a).) Moreover, a separate declaration must accompany the motion which specifies: (1) the effect of the amendment, (2) why the amendment is necessary and proper, (3) when the facts giving rise to the amended allegations were discovered, and (4) the reasons why the request for amendment was not made earlier. (Cal. Rule of Court, Rule 3.1324, subd. (b).)

Rule 3.1324 is only partially complied with. The proposed amended cross-complaint is attached as Exhibit A to the Declaration of Michael S. Helsley. The Helsley Declaration states that a new cause of action is to be added related to J&D's alleged breach of the CC&Rs. (Helsley Decl. ¶ 7.) The effect of the amendment is discussed at paragraph 7, i.e., that it includes a new cause of action for the breach of the CC&Rs related to the duty to insure OSH. The declaration does not state why the amendment is necessary and proper, although the memorandum of points and authorities indicates that the

amendment would allow all of OSH's claims to be tried in a single action and promote judicial economy. There is absolutely no indication as to when the facts giving rise to amended allegations were discovered, but it must have been far in advance of the motion, as Helsley indicates there have been "several" discussions between the parties as to the lack of insurance and violation of the CC&Rs. The only reason offered for the delay in bringing the motion was OSH's desire to see of the case would settle.

"Even if a good amendment is proposed in proper form, unwarranted delay in presenting it may be a reason for denial." (5 Witkin, *California Procedure* (5th Ed.) "Pleading" § 1201.) "The cases do not always make it clear whether they rest upon (1) the subjective element of lack of diligence in discovering the facts or in offering the amendment after knowledge of them, or (2) the effect of the delay on the adverse party. But in most cases both factors are involved." (*Ibid*.) Still, even delay in bringing a motion to amend is usually not grounds for its denial unless a party has been prejudiced thereby. (*Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048, citing *Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564-565.)

J&D claims it would be prejudiced by the amendment because it would not have time to conduct discovery and prepare a motion for summary judgment. J& D omits to state what discovery is needed after an extended period of being aware of the claims and fails to describe either the discovery or how it will further its defense. Further, J&D declines to state how the new cause of action is expected to be vulnerable to summary adjudication. In short, J&D has failed to demonstrate any prejudice by allowing the late amendment.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **5-30-12**

Issued By: _____ on _____.
(Judge's initials) (Date)

(18)

Tentative Ruling

Re: ***Major Sekhon v. Jaswinder Kaur, et al.***
Case no. 11CECG03150

Hearing Date: **May 31, 2012 (Dept. 501)**

Motion: By defendants Kaur and Singh, objection to the undertaking ordered as a condition of keeping the lis pendens in effect

Tentative Ruling:

Pursuant to California Code of Civil Procedure (CCP) sections 405.37 and 995.010, et seq., to find good cause is shown and require a new undertaking. Plaintiff is ordered to provide a new undertaking that complies with CCP section 995.010, et seq. within 30 days of this order.

Explanation:

CCP section 995.510(a)(1) provides that a surety is a person other than the principal. Plaintiff Major Sekhon serves as the surety for the subject undertaking. Thus, as plaintiff is the sole person acting as surety the undertaking fails to comply with applicable statutory requirements.

Pursuant to California Rules of Court rule 3.1312, and CCP section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: **M.B. Smith** **on** **5/29/12** .
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Donna Morrison v. Orchard Supply Hardware Stores et al.***
Superior Court Case No. 10 CECG 01146

Hearing Date: May 31, 2012 **(Dept. 402)**

Motion: Quash Service of Summons

Tentative Ruling:

To grant the motion without prejudice as stated infra. The issues regarding the requirements for service as a Doe are not ripe for adjudication at this time. Whether Numark Industries Company Ltd. manufactured the swing cannot be addressed via a motion to quash.

Explanation:

Service via Publication

CCP § 415.50. Service by publication; Prerequisite affidavit; Order for publication in named newspaper; When service complete; Service other than by publication

(a) A summons may be served by publication if upon affidavit it appears to the satisfaction of the court in which the action is pending that the party to be served cannot with reasonable diligence be served in another manner specified in this article and that either:

(1) A cause of action exists against the party upon whom service is to be made or he or she is a necessary or proper party to the action.

(2) The party to be served has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in the property.

(b) The court shall order the summons to be published in a named newspaper, published in this state, that is most likely to give actual notice to the party to be served. If the party to be served resides or is located out of this state, the court may also order the summons to be published in a named newspaper outside this state that is most likely to give actual notice to that party. The order shall direct that a copy of the summons, the complaint, and the order for publication be forthwith mailed to the party if his or her address is ascertained before expiration of the time prescribed for publication of the summons. Except as otherwise provided by statute, the publication shall be made as provided by Section 6064

of the Government Code unless the court, in its discretion, orders publication for a longer period.

(c) Service of a summons in this manner is deemed complete as provided in Section 6064 of the Government Code.

(d) Notwithstanding an order for publication of the summons, a summons may be served in another manner authorized by this chapter, in which event the service shall supersede any published summons.

(e) As a condition of establishing that the party to be served cannot with reasonable diligence be served in another manner specified in this article, the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database, including, but not limited to, voter registration rolls and records of the Department of Motor Vehicles.

Pursuant to CCP § 415.50, service is authorized by publication of summons in a newspaper of general circulation. However, Plaintiff must obtain a *court order* before attempting service by this method. The statute itself is *strictly* construed: "If there is any situation in which strict compliance can reasonably be required, it is that of service by publication." [*County of Riverside v. Sup.Ct. (Hill)* (1997) 54 CA4th 443, 450; see also *Katz v. Campbell Union High School Dist.* (2006) 144 CA4th 1024, 1034] Plaintiff's attorney must prepare an affidavit containing certain essential facts regarding reasonable diligent efforts to serve the party via some other method. Typically, it is submitted to the court on an ex parte basis. The affidavit for publication of summons must be by a person who is a *competent* witness to the essential facts.

Motion to Quash Service of Summons

Without valid service of summons, the court never acquires jurisdiction over defendant. Hence, the statutory ground for the motion to quash is that the court *lacks jurisdiction* over the defendant. [CCP § 418.10(a)(1)] A defendant is under no duty to respond in any way to a defectively served summons. It makes no difference that defendant had actual knowledge of the action. Such knowledge does not dispense with statutory requirements for service of summons. [*Kappel v. Bartlett* (1988) 200 CA3d 1457, 1466; *Ruttenberg v. Ruttenberg* (1997) 53 CA4th 801, 808] "When a defendant challenges the court's personal jurisdiction on the ground of improper service of process the burden is on the plaintiff to prove ... the facts requisite to an effective service." [*Summers v. McClanahan* (2006) 140 CA4th 403, 413]

Motion at Bench

The Declaration of Lee states that Numark is a Taiwanese corporation with Taipei as its principal place of business and the location of its headquarters. She

states that Numark does not own any manufacturing facilities in California, Indiana nor anywhere in the United States. She further declares that Number does not own any repair, customer service or sales offices/facilities in California, Indiana nor anywhere else in the United States. She also declares that Numark is not "authorized, registered, or licensed to conduct any business activities" in California, Indiana or anywhere else in the United States and has never sought to register itself to conduct any business activities in California, Indiana or anywhere else in the United States. It does not maintain any offices in California, Indiana or the rest of the United States nor does it have any officers, directors or employees/sales persons who reside in the California, Indiana or anywhere else in the USA. It does not own any Customer Service or "Call" Centers in California, Indiana or elsewhere in the USA. Id. at ¶¶ 1-11.

In opposition, the Declaration of Daniel Stein is submitted and he sets forth the reasons for naming Numark as a Doe and the efforts to locate a service address for this company. But, the fact remains that a company named Numark Industries is moving to quash service of the summons. This company has submitted the Declaration of its Controller under penalty of perjury. The Declaration states that the company is located in Taiwan. Obviously, service via publication in a newspaper in Indiana is not sufficient. See CCP § 415.50(b):

> "The court shall order the summons to be published in a named newspaper, published in this state, that is **most likely to give actual notice** to the party to be served. If the party to be served resides or is located out of this state, the court may also order the summons to be published in a named newspaper outside this state that is *most likely to give actual notice* to that party. . . "

Again, it makes no difference that Numark did receive notice or it would not have filed a motion to quash. The important fact remains that the service at bench is insufficient to confer the jurisdiction of this court over the moving Defendant. See CCP § 418.10(a)(1) and *Ruttenberg v. Ruttenberg* (1997) 53 CA4th 801, 808. The Plaintiff has not met her burden of proof and the motion will be quashed. See *Summers v. McClanahan* (2006) 140 CA4th 403, 413. However, service on Defendants located in foreign companies is permitted. See CCP § 413.10(c). Therefore, the Plaintiff will be permitted to accomplish service in a manner consistent with the statute.

As for the remaining grounds set forth in the moiton to quash, given that the Court does not have jurisdiction over this Defendant, whether its service as a Doe Defendant was valid is not ripe for determination at this time. As for whether there is "enough evidence" to determine that Numark manufactured the swing, this is a factual issue that cannot be addressed via a motion to quash. Typically, this would be determined via summary judgment. Therefore, this issue will not be addressed at this time.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary.

The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 5/30/2012 .

(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Eulalio Guerrero v. James Yates et al.***
Superior Court Case No. 10 CECG 01580

Hearing Date: May 31, 2012 **(Dept. 502)**

Motion: Demurrer to the Original Complaint

Tentative Ruling:

To take the hearing off calendar. The demurring Defendant must re-calendar, re-file and re-serve the demurrer (within the statutory limits set forth in CCP § 1005(b)) upon the Plaintiff at the following address: Eulalio Guerrero, CDC #F24801, 5150 O'Byrnes Ferry Road, Housing #, Jamestown, CA 95327. Defendant is to determine the Plaintiff's housing number.

Explanation:

Plaintiff was originally housed at Pleasant Valley State Prison. On March 12, 2010 he filed a Complaint against Pleasant Valley State Prison and Warden James Yates. At a time unknown, he was transferred to the Sierra Conservation Center. Plaintiff failed to file and serve a change of address upon the Court and the Defendants in this action.

On April 3, 2012 Defendant Yates filed a demurrer. The demurrer was served on April 2, 2012 via mail upon the Plaintiff at: Sierra Conservation Center, **5100** O'Byrnes Ferry Road, P.O. Box 497, Jamestown, CA 95327-0497. No opposition was filed. However, according to the California Department of Corrections & Rehabilitation, the inmate mailing address is **5150** O'Byrnes Ferry. Given his incarceration, Plaintiff must be allowed an opportunity to oppose and participate in the hearing on the demurrer. See *Hoversten v. Superior Court* (1995) 74 Cal.App.4th 636. But, the demurrer at bench was not served at the proper address. As a result, the demurrer must be re-calendared, re-filed and re-served.

Pursuant to California Rules of Court, Rule 3.1312(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling **DSB** **5-30-12**

Issued By: _____ on _____.
(Judge's initials) (Date)

Tentative Ruling

(17)

Re: ***Cital v. The McCaffrey Group, Inc. et al.***
Superior Court Case No. 11 CECG 01451

Hearing Date: May 31, 2012 (Dept. 503)

Motion: Motion to Compel ADR

Tentative Ruling:

To deny the motion as to plaintiffs Angelique and Jesus Cital, Hattie McKay, Philip Ramirez, and Renee Philips, Doris Goss, Edward & Linda Koleen, Susan Olsen; Chris Kautzman, Kimberly Torres, Daniel , Jr. & Denise Nunez outright. To continue the motion to June 21, 2012 to allow the remainder of the plaintiffs to submit declarations evidencing procedural unconscionability, if they may truthfully do so. Plaintiffs' declarations must be filed and served by fax or overnight service by June 11, 2012. Opposition and objections to the declarations, if any, must be filed and served by June 18, 2012. If declarations evidencing procedural unconscionability are not submitted, the motion will be granted as to the remainder of the plaintiffs.

Explanation:

Original Purchaser Plaintiffs:

Defendant McCaffrey seeks to compel the original purchaser plaintiffs to complete the ADR contemplated by the homeowner agreements. The 2001 Warranty Agreement at § E(4), the 2001 Purchase at § 12(d), the 2003 Warranty Agreement at § F, and the 2003 Purchase Agreement at § 11 all contain a provision permitting either party to the agreement to obtain a court order to compel compliance with the contractual ADR procedure, if the other party fails to honor its ADR obligations under the contract.

McCaffrey takes the position that the ADR provisions are enforceable because they are not unconscionable, citing *Trend Hones, Inc. v. Superior Court* (2005) 131 Cal.App.4th 950, 964, *Greenbriar Homes Communities, Inc. v. Superior Court* (2004) 117 Cal.App.4th 337, 345 and *Woodside Homes of California, Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 736 (*Woodside Homes*). However, the cases have only minor presidential value. The ADR provisions in the instant agreements are unenforceable due to unconscionably for reasons that have little or nothing to do with the reasons examined in the cited cases.

Defenses to Arbitration – Unconscionability

The doctrine of unconscionability " 'both a "procedural" and a "substantive" element,' the former focusing on ' "oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on ' "overly harsh" ' or ' "one-sided" ' results." (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 114 (*Armendariz*).) To invalidate an arbitration agreement, both procedural and substantive unconscionability must be present, but the showing required in support of the procedural element diminishes if the substantive element is significant. (Id. at p. 122; Woodside Homes, supra, 107 Cal.App.4th at p. 727.) If we find a term to be unconscionable, we must then decide if it is severable or if the taint permeates the entire arbitration agreement. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1074-1075.)

Procedural Unconscionability

The procedural element of an unconscionable contract generally takes the form of a contract of adhesion, " 'which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' " (*Armendariz*, *supra*, 24 Cal. 4th at p. 113.) "The procedural element of unconscionability focuses on two factors: oppression and surprise. [Citation.] ' "Oppression" arises from an inequality of bargaining power which results in no real negotiation and "an absence of meaningful choice." ' [Citation.] ' "Surprise" involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms.'" (*Aron v. U-Haul Co. of California* (2006) 143 Cal.App.4th 796, 808.) However, "[a]dhesion is not a prerequisite for unconscionability." (*Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1409.) A contract term may be held to be unconscionable even if the weaker party knowingly agreed to it. (E.g., *Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174–175.)

"'The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.]" (*Armendariz*, *supra*, 24 Cal.4th at p. 113, quoting *Neal v. State Farm Ins. Cos*. (1961) 188 Cal. App. 2d 690, 694.)

Here, plaintiffs have submitted declarations from only five of the forty-five plaintiffs: Angelique and Jesus Cital, Hattie McKay, Philip Ramirez, and Renee Philips. They tell essentially the same story. Each insists they he or she was rushed through the signing project and they were under great stress at the time. "[They] had no bargaining or negotiation power when purchasing the home. If [they] had refused to sign any portion of the documents, [they] would not have been able to purchase the home." The provisions were not explained to them, or the explanations were very weak. They uniformly declare that they never understood that they "were giving up their rights to a jury trial in the event that they discovered construction defects in the home[s]."

"The general rule 'that one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it' applies only in the absence of 'overreaching' [citation omitted] or 'imposition' [citation]. Thus, it does not apply to an adhesion contract. [Citations.] Indeed, failure to read the contract helps 'establish actual surprise …' [Citations]." (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1291 (*Bruni*).)

A variety of cases examine the situations where a home sale contract has been found adhesive. In *Pardee Construction Co. v. Superior Court* (2002) 100 Cal.App.4th 1081, the court upheld a finding that a homebuilder's standard purchase and sale agreement, which included a provision for having disputes heard by a judicial referee, was a contract of adhesion. (*Id*. at pp. 1086–1087.) It explained: "[A]s potential buyers interested in [the builder's] entry-level homes, plaintiffs were unlikely to have significant economic bargaining power against [a] developer … . Moreover, since judicial reference provisions were contained in agreements for purchase of all homes in [the builder]'s large development, plaintiffs had little choice other than to sign those agreements as presented … . [T]he situation presented each buyer with 'a take-it-or-leave-it proposition'; and since each buyer was 'buying a house,' not 'a piece of sporting equipment' or some other 'regular type of product,' factors such as 'location,' 'view,' and 'set-back' made it 'a pretty unique purchase,' one that 'for most people' is 'the biggest purchase they will ever make in their life.' … '[A]s a practical matter,' [the builder]'s argument that plaintiffs 'can go elsewhere if they don't like it' flies 'in the face' of 'the uniqueness of a home.' " (*Id*. at p. 1087.)

By contrast, in *Woodside Homes*, *supra*, 107 Cal.App.4th 723, *Pardee* was distinguished, finding no evidence that a buyer could not have rejected the judicial reference provision and no evidence from which this could even have been inferred (e.g., that the homes were " 'entry level,' " or that "similarly priced housing stock in the region" was unavailable). (Id. at pp. 728–729.) The court also noted that "the Buyers were necessarily 'made aware of the existence of [the judicial reference] provision' because they had to initial the paragraph separately. [Citation.]" (*Id*. at p. 729, quoting *Wheeler v. St. Joseph Hospital* (1976) 63 Cal. App. 3d 345, 361.) The appellate court concluded, "Even if we do assume an imbalance in bargaining power, and that [the builder], as the stronger party, presumably prepared the contracts with an eye to its own advantage, and even if we also assume that [the builder] would not have countenanced the striking of the judicial reference provisions, the Buyers have nevertheless only shown a low level of procedural unconscionability because … the elements of surprise or, a fortiori, misrepresentation [citation] were not present." (*Woodside Homes*, *supra*, at p. 730.)

Similarly, in Trend Homes, Inc. v. Superior Court, supra, 131 Cal.App.4th 950, the court also distinguished Pardee. It noted that (1) the judicial reference provision was "clearly written, entirely capitalized, and easily understood"; (2) both parties had to separately initial the provision, suggesting not only that the buyers had actual notice of it, but also that they could have refused to agree to

it; (3) there was no evidence that the builder would have refused to delete the provision; (4) "there was no evidence concerning the availability of similarly priced housing in the area"; (5) there was no evidence that the buyers "lacked the education, experience, or sophistication necessary to understand the contracts"; and (6) the buyers "did not state that they had insufficient time to read the provision, were pressured to sign it without reading it carefully, or were not afforded the opportunity to consult with anyone else, such as an attorney, before signing … ." (*Id.* at pp. 958–959.)

There is some evidence that the contract was one of adhesion. The price of the homes ranged from $121,900 (sold to the Johnsons in October of 2001) and $244,900 (sold to Ricardo Romero in August 2004), based the Court's recollection, this range approximates the price of entry level homes in the Fresno vicinity during those years. Each declarant enumerated a combination of features that made their home specifically desirable to them. Land is unique. (*Pardee*, *supra*, 100 Cal.App.4th at p. 1087.) Although the ADR provision is clear, easily understandable and separately initialed, the only evidence before the court is the entire contract was presented in a "take-it-or-leave-it" fashion.

Unfortunately, there is only evidence of procedural unconscionability as to only five of the many plaintiffs. Realistically, the court can only deny the motion as to these plaintiffs unless the court continues the motion to allow the remainder of the plaintiffs to submit declarations, if they can, evidencing procedural unconscionability.

Unconscionability – Substantive Unconscionability

Substantive unconscionability focuses on whether the provision is overly harsh or one-sided. Where the provision falls outside the reasonable expectations of the party or is unduly oppressive, it is substantively unconscionable. (*Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 88.) Where provisions in the purchase agreement are for the benefit of the drafting party only, the agreement's arbitration clause may be substantively unconscionable. (*Pardee Construction Co. v. Superior Court*, *supra*, 100 Cal.App.4th 1081.)

Here, plaintiffs have made a strong showing of substantive unconscionability which offsets the fairly week showing of procedural unconscionability due to the fact that the ADR provisions fail to comply with the spirit and intent of the Right to Repair Act.

Right to Repair Act:

In 2002, the Legislature enacted sections 895 through 945.5, to "specify the rights and requirements of a homeowner to bring an action for construction defects, including applicable standards for home construction, the statute of limitations, the burden of proof, the damages recoverable, a detailed

prelitigation procedure, and the obligations of the homeowner." (Legis. Counsel's Dig., Sen. Bill No. 800 (2001–2002 Reg. Sess.).)

The nonadversarial prelitigation procedure set out in Chapter 4 requires that the homeowner give written notice to the builder of the claim that the builder violated the standards of Chapter 2, describing the nature and location of the claimed violations. (Civ. Code § 910.) The builder has a specified time within which to acknowledge receipt of the notice; the builder may inspect and test the claimed defects, if it elects to do so, then make a written offer to repair the defects and set a reasonable completion date. (Civ. Code § 917.) The homeowner may authorize the repairs as proposed, or request repairs by a different contractor. (Civ. Code § 918.) The repairs must be commenced within specified time periods, done "with the utmost diligence," and "completed as soon as reasonably possible." (Civ. Code § 921.) The builder's offer to repair the defects must be accompanied by an offer to mediate the dispute if the homeowner so chooses. (Civ. Code § 919.) If the builder fails to acknowledge receipt of the claim, fails to make an offer to repair, fails to complete the repair within the time specified in the repair plan, or fails to "strictly comply with this chapter within the times specified, the claimant is released from the requirements of this chapter and may proceed with the filing of an action." (Civ. Code § 920; see §§ 915, 925, 930.)

Under the statutory scheme, the builder has the option of contracting for an alternative nonadversarial prelitigation procedure, in lieu of the procedure set out in Chapter 4, at the time of the initial sale of the home. Section 914, subdivision (a), provides:

> This chapter establishes a nonadversarial procedure, including the remedies available under this chapter which, if the procedure does not resolve the dispute between the parties, may result in a subsequent action to enforce the other chapters of this title. A builder may attempt to commence nonadversarial contractual provisions other than the nonadversarial procedures and remedies set forth in this chapter, but may not, in addition to its own nonadversarial contractual provisions, require adherence to the nonadversarial procedures and remedies set forth in this chapter, regardless of whether the builder's own alternative nonadversarial contractual provisions are successful in resolving the dispute or ultimately deemed enforceable.
>
> At the time the sales agreement is executed, the builder shall notify the homeowner whether the builder intends to engage in the nonadversarial procedure of this section or attempt to enforce alternative nonadversarial contractual provisions. If the builder elects to use alternative nonadversarial contractual provisions in lieu of this chapter, the election is binding, regardless of whether the builder's alternative nonadversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed enforceable.

(Civ. Code § 914, subd. (a).)

However, Chapter 4 contains no specifics regarding what provisions the alternative nonadversarial contractual provisions may or must include. (*Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1224.) Nevertheless, the legislative history of the Act is clear: "The bill establishes a mandatory process prior to the filing of a construction defect action. The major component of this process is the builder's absolute right to attempt a repair prior to a homeowner filing an action in court. Builders, insurers, and other business groups are hopeful that this right to repair will reduce litigation." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, p. 5; see also Anders v. Superior Court (2011) 192 Cal.App.4th 579, 590.) "The bill also responds to concerns expressed by builders, subcontractors, and insurers over the costs of construction defect litigation [and] their impact on housing costs in the state." (*Id*. at p. 4.) The tradeoff for promoting prelitigation repairs of construction defects in order to avoid the costs of litigation by builders and the resulting increased costs of construction in the state was the Act's provisions establishing a timetable for the repairs which protected homeowners by preventing inordinate delay in their pursuit of a remedy. (*Anders v. Superior Court*, *supra*, 192 Cal.App.4th at p. 590.)

The Act contains very rigid timelines. (See Civ. Code §§ 917-918, 920-921.) McCaffrey's contractual provision contains only one – the first step, a "meet and confer" meeting must take place within 60 days of the notice of claim. During this time McCaffrey must have access to the property and has the right to make repairs. However, there is no contractual time limit to reach a decision as to whether repairs will be offered, to conduct repairs if any are agreed on, to conduct mediation and/or to conduct a judicial reference.

Compare this to the Act. If the builder elects to inspect the property and "unmet standards of construction," it must do so within 14 days of the receipt of notice of claim. (Civ. Code § 916.) If a second inspection is sought, it must be completed within 40 days of the first inspection. (Ibid.) If the builder decides to make an offer to repair it must be made within 30 days of the initial or second inspection. (Civ. Code § 917.) The homeowner must authorize the repair within 30 days.

The Act specifically contemplates that some builders' contractual prelitigation procedures will be deemed unenforceable and courts have recognized this eventuality. (See Civ. Code § 914, subd. (a) ["regardless of whether the builder's own alternative nonadversarial contractual provisions are … ultimately deemed enforceable"]

> [A] builder who elects to use alternative prelitigation procedures in lieu of those set out in the statute has the right to attempt repairs, *so long as it does so pursuant to procedures that are fair and enforceable*. If, however, the builder imposes procedures that are found to be unenforceable, it forfeits its absolute right to attempt repairs. It may still

> offer to repair any defects, but the homeowner is not bound to accept the offer or to permit the builder to attempt the repairs prior to litigation. The builder thus has an incentive to ensure its alternative procedures are proper and enforceable, and the homeowner's protection against unnecessary delay is preserved.

(*Anders v. Superior Court*, *supra*, 192 Cal.App.4th at p. 591 (italics added).)

Subsequent Purchasers:

McCaffrey contends that even if the contractual ADR provisions are unenforceable, the Act applies to the claims of the homeowners who did not purchase their homes from McCaffrey. Plaintiffs contend that McCaffrey's use of home sale agreements that contain contractual ADR agreements is a clear "opt out" of the statutory prelitigation procedures set forth in the Right to Repair Act. The contractual procedures were recorded in the CC&Rs for the properties and required the original purchasers to give copies of the original home sales documents to subsequent purchasers.

McCaffrey cannot enforce the Right to Repair Act against the subsequent purchasers. The Fifth District of Appeal addressed a similar question in *Anders v. Superior Court*, *supra*, 192 Cal.App.4th 579. In *Anders*, a builder had brought a motion to compel compliance with its contractual ADR procedures against the original and subsequent purchasers. (Id. at p. 588.) The trial court found the contractual ADR provisions unconscionable and unenforceable. The appellate court interpreted Civil Code section 914, subdivision (a) as providing:

> The intent manifested in the plain language of the statute is that a builder may attempt to use one set of procedures or the other, but not both. If the builder elects or attempts to use its alternative contractual procedures, it may not thereafter require the homeowners to comply with the statutory prelitigation procedures, even if its attempt at enforcement of its own procedures fails because the alternative procedures are found to be unenforceable.

(Id. at p. 589.)

McCaffrey distinguishes *Anders* on the ground that it has not brought a motion to enforce the contractual ADR provisions against the subsequent purchasers, thus it has not attempted to use its contractual procedures against the subsequent purchasers. However, section 914, subdivision (a) requires only that the builder elect to use its own alternate procedures, not that it attempt to do so. The definitions of the verb "elect" include: "to make a selection of" and "to choose (as a course of action) especially by preference." (http://www.merriam-webster.com/dictionary/elect) The presence of the contractual ADR provisions in the original sales agreements is evidence of an "election" to use them and not the statutory procedures.

McCaffrey counters that it cannot use the contractual ADR procedures because it is not in a contractual relationship with the subsequent purchasers. However, the Right to Repair Act requires the builders to "record on title a notice of the existence of these [ADR] procedures" and "to instruct the original purchaser to provide the [sales] documents to any subsequent purchaser" when it sells the units. Since the original purchasers sign and initial the ADR procedures, the only purpose of these provisions is to place subsequent purchasers on notice of the alternate ADR procedures. Indeed, as McCaffrey has incorporated the contractual ADR procedures into the CC&Rs, and CC&Rs are binding on subsequent purchasers, it seems clear that the Act contemplates the alternative ADR procedures being binding on subsequent purchasers. (See *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 349.)

Similarly, the ADR procedures of the Act itself are binding on the original buyer as well as subsequent purchasers. Civil Code section 945 states: "The provisions, standards, rights, and obligations set forth in this title are binding upon all original purchasers and their successors-in-interest." It would be anomalous, if the builder, having elected out of the Act, and later finding its alternative ADR provisions unenforceable, could find solace that as each home is resold, each new buyer would fall into the provisions of the act, restoring the builder's right to prelitigation ADR. This outcome is inconsistent with the plain language of the Right to Repair Act and *Anders*. The Court will not compel compliance with the ADR procedures of the Right to Repair Act against the subsequent purchasers, nor stay the litigation until those procedures have been exhausted.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 5/30/12.
(Judge's initials) (Date)